ATTORNEY FOR APPELLANT:

ROBERT D. KING, JR.
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

LYNN WILSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0608-CR-463
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Nancy L. Broyles, Master Commissioner
Cause No. 49G05-0509-FB-160665

April 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Lynn Wilson appeals his conviction for Possession of a Firearm by a Serious Violent Felon, a Class B felony, and his adjudication as an Habitual Offender following a jury trial. He presents two issues for our review:

1. Whether the trial court abused its discretion when it admitted into evidence a handgun police found in his pants' pocket in the course of a Terry stop.

2. Whether the trial court evidenced bias against Wilson at sentencing.

We affirm.

FACTS AND PROCEDURAL HISTORY

On September 19, 2005, Indianapolis Police Officer Wetzell Hill was dispatched to 2441 East Wade Street on a report of a domestic disturbance. Officer Hill did not have any additional information regarding the dispatch. When he approached the area of the residence approximately three minutes after the dispatch, he observed a car pulling out of a parking spot and starting to drive away in the 2400 block of East Wade Street. Because his experience has taught him that parties involved in domestic disturbances frequently leave the scene, Officer Hill exited his car and approached the open passenger window of the other car. Officer Hill asked the driver, who was the car's only occupant, whether he had just left 2441 East Wade Street, and the driver, Wilson, responded affirmatively. Then, Officer Hill asked Wilson, "[C]ould you please back up so I can figure out what's going on here[?]" Transcript at 48. Wilson agreed and parked his car.

Officer Hill asked Wilson to exit his car, and he complied. As Wilson approached him, Officer Hill asked Wilson to show him his hands to "make sure [he did not] have

any weapons." Id. at 50. Wilson initially complied, but when Officer Hill began a pat-down search for weapons, Wilson put his arms down and appeared to be reaching for his right pants' pocket. Officer Hill asked Wilson what he was doing, and he replied that he wanted to get a cigarette. Officer Hill told Wilson to wait and asked him to put his hands back up in the air. Wilson complied, but then he abruptly put his arms down again. At that point, another officer arrived to assist Officer Hill, and the officers grabbed Wilson by his arms and placed him in handcuffs. Officer Hill asked Wilson why he was reaching for his pocket, and he ultimately admitted that he had a handgun.

The State charged Wilson, who had a prior conviction for voluntary manslaughter, with possession of a firearm by a serious violent felon, carrying a handgun without a license, resisting law enforcement, and being an habitual offender. On the first day of trial, the State dismissed the charges for carrying a handgun without a license and resisting law enforcement. In addition, Wilson moved to suppress the evidence, alleging that the stop was illegal. The trial court denied that motion following a hearing. The jury found Wilson guilty of possession of a firearm by a serious violent felon, but the jury deadlocked on the habitual offender count, and the trial court declared a mistrial as to that count only. After Wilson was retried on that count, he was adjudicated an habitual offender. The trial court entered judgment accordingly and sentenced Wilson to a total term of twenty-three years. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Search and Seizure

Wilson first contends that the trial court erred when it denied his motion to suppress evidence. In particular, he maintains that he was illegally stopped and that the evidence obtained as a result of that stop and search, including the handgun found in his pocket, should have been excluded at trial. Although he originally challenged the admission of the evidence through a motion to suppress, Wilson appeals following a completed trial and challenges the admission of such evidence at trial. "Thus, the issue is . . . appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial." Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). We have indicated that our standard of review of rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection. Ackerman v. State, 774 N.E.2d 970, 974-75 (Ind. Ct. App. 2002), trans. denied. We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. Overstreet v. State, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), trans. denied. However, we must also consider the uncontested evidence favorable to the defendant. See id.

Wilson asserts that the officers' stop of him violated his rights under the Fourth Amendment to the United States Constitution.[1] In particular, Wilson contends that the officers did not have reasonable suspicion to conduct a Terry stop. In addition, Wilson asserts that the officers' pat-down search was illegal and that the admission into evidence

[1] Wilson does not make a separate argument under the Indiana Constitution.

of the gun found in his pocket was fundamental error. We address each contention in turn.

Initially, we observe that Wilson has waived these issues for appellate review. It is well-settled that a trial court's denial of a motion to suppress is insufficient to preserve error for appeal. Washington v. State, 784 N.E.2d 584, 586 (Ind. Ct. App. 2003). Rather, the defendant must make a contemporaneous objection to the admission of evidence at trial. Id. Here, Wilson did not make a contemporaneous objection when Officer Hill testified regarding the handgun officers found in his pocket. As such, any challenge to the trial court's admission of the evidence is waived.[2] See id. Waiver notwithstanding, we hold that the trial court did not abuse its discretion when it permitted the challenged evidence.

The Fourth Amendment to the United States Constitution provides, in pertinent part: "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. The Fourth Amendment's protection against unreasonable searches and seizures has been extended to the States through the Fourteenth Amendment. See Berry v. State, 704 N.E.2d 462, 464-65 (Ind. 1998). As a general rule, the Fourth Amendment prohibits a warrantless search. Id. Consequently, when a search is conducted without a warrant, the State has the burden of proving that the search falls into one of the exceptions to the warrant requirement. Id. at 465. There are limited exceptions to the warrant requirement under the Fourth Amendment. See Smock v. State, 766 N.E.2d 401,

[2] Wilson subsequently objected to the admission of the gun and ammunition, but that evidence was merely cumulative of Officer Hill's testimony. As such, any error in the admission of that evidence was harmless. See Edwards v. State, 730 N.E.2d 1286, 1289 (Ind. Ct. App. 2000).

404 (Ind. Ct. App. 2002). One such exception is the Terry investigatory stop. Bratcher v. State, 661 N.E.2d 828, 830 (Ind. Ct. App. 1996).

A traffic stop is akin to an investigative stop under Terry v. Ohio, 392 U.S. 1 (1968). Lockett v. State, 747 N.E.2d 539, 541 (Ind. 2001). In Terry, the United States Supreme Court established that the police may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based on specific and articulable facts, the officer has a reasonable suspicion that criminal activity "'may be afoot.'" Stalling v. State, 713 N.E.2d 922, 924 (Ind. Ct. App. 1999) (quoting Terry, 392 U.S. at 27). In Berkemer v. McCarty, 468 U.S. 420, 439-40 (1984), the court explained further:

> Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing or is about to commit a crime, may detain that person briefly in order to "investigate the circumstances that provoke suspicion." [United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975)]. "[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" [Id. (quoting Terry, 392 U.S. at 29)]. Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions.

"[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop" and "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Lockett, 747 N.E.2d at 541-42 (quoting Florida v. Royer, 460 U.S. 491, 500 (1983)).

We have held that a consideration of the totality of circumstances should be utilized in determining whether the police had reasonable suspicion to believe there is criminal activity afoot. Carter v. State, 692 N.E.2d 464, 467 (Ind. Ct. App. 1997). This

includes, but is not limited to: "[a]n office's knowledge, experience and training[.]" Id. (quoting Wilson v. State, 670 N.E.2d 27, 31 (Ind. Ct. App. 1996)). Here, Officer Hill, who has investigated "hundreds" of domestic disturbances in his career, knew from experience that suspects involved in such incidents typically attempt to flee the scene. Transcript at 47. Thus, when Officer Hill observed Wilson starting to drive away from a parking spot near the subject residence, he stopped to ask him whether he had just left the residence. That encounter was sufficiently brief and non-intrusive to constitute a valid Terry stop.

Then, after Wilson replied that he had just left the subject residence, Officer Hill had reasonable suspicion to believe that Wilson was involved in the alleged disturbance, and he had, therefore, a legal basis to conduct a more thorough investigative stop. With regard to whether the ensuing pat-down search was reasonable, we find this court's opinion in State v. Gladney, 793 N.E.2d 264 (Ind. Ct. App. 2003), helpful. The relevant analysis in that case is as follows:

> Because we conclude that Officer Allen had the requisite reasonable suspicion to perform an investigatory stop of the car, we must next determine whether the events that led to the discovery and seizure of the handgun were also lawful. It is well-settled that: "The purpose of a limited search for weapons after an investigative stop is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear for his safety or the safety of others." State v. Dodson, 733 N.E.2d 968, 971 (Ind. Ct. App. 2000). An officer may only conduct a limited search for weapons when he has a reasonable belief that the suspect is armed and dangerous. Id. However, the police officer need not be absolutely certain that the individual is armed. Id. Rather, the issue is whether a reasonably prudent person in the same circumstances would be warranted in the belief that his safety or that of another was in danger. Id. "In determining whether the police officer acted reasonably under the circumstances, due weight must be given, not to the officer's inchoate and unparticularized

> suspicions, but to the specific reasonable inferences which the officer is entitled to draw from the facts in light of his experience." Id. at 971-72.
>
> In the present case, the undisputed facts demonstrate that when Officer Allen approached the car, the driver started the car and the car began slowly moving. At that time, Officer Allen observed Gladney "fumbling with a sweatshirt and what appeared to be some kind of object in the sweatshirt." Appellant's App. at 51. Accordingly, Officer Allen ordered the driver of the car to stop, and she complied. Because Officer Allen could not see Gladney's hands and because Gladney continued to fidget with an object in the sweatshirt, Officer Allen suspected that Gladney was hiding a weapon in the sweatshirt. Consequently, Officer Allen drew his weapon and ordered Gladney to put down the sweatshirt and show his hands. Under these facts and circumstances, coupled with Officer Allen's experience with the east district, Officer Allen had reasonable suspicion to believe that Gladney may be hiding a weapon under the sweatshirt, and therefore, his request for Gladney to show his hands was proper.

Id. at 269 (emphasis added).

Here, because Officer Hill's experience has taught him that people involved in domestic disturbances are often armed, and because he had verified that Wilson had just left the residence where the domestic disturbance had allegedly occurred, Officer Hill's pat-down search for weapons was not unreasonable. And, during the course of the search, Wilson volunteered that he had a handgun in his pocket. We conclude that the seizure and search of Wilson did not violate Terry principles, and the trial court did not abuse its discretion when it admitted the challenged evidence.

Issue Two: Judicial Bias

Wilson next contends that the trial judge made comments that "call[ed] into question her objectivity and impartiality." Brief of Appellant at 10. He maintains that the trial judge was saying, in essence, "you made the decision to take your case to jury,

you lost, and now you have to live with that decision." Id. at 11. We cannot agree that the trial judge's remarks indicate bias against Wilson.

At sentencing, Wilson offered an explanation for his possession of the handgun that he had not previously offered to the State. In particular, Wilson stated that he had found the handgun sitting on a table, in plain view, where, he feared, a ten-year-old resident of 2441 East Wade Street, "with psychiatric problems," might get his hands on it. Transcript at 320. And it was only in an effort to take the handgun to the nearest police station that he was in possession of the handgun when Officer Hill stopped him. In asking for the minimum sentence, Wilson's counsel stated, "obviously Mr. Wilson is not going to testify at the trial when he's got a voluntary manslaughter conviction that the jury would hear about, and so that is the reason the jury didn't hear about [the explanation offered at sentencing]." Id. at 324.

In response, the trial court stated:

> Well, all I can really say about that is that [the Prosecutor] is correct to the extent that this is not sworn testimony that we heard. And sometimes I understand why people don't want to do it, and Mr. Wilson was asked to waive jury and frankly sometimes people need to understand that when you do that, I look at the court file, I already knew he had the voluntary manslaughter it wasn't [sic] going to prejudice me and then he could have testified. So people have to live with the decisions they make.

Id. at 325 (emphasis added). Wilson did not object to the trial judge's comments, nor did he immediately correct the trial judge's mistaken belief that he had refused to waive his right to a jury trial.

After the trial court sentenced Wilson, the following colloquy occurred:

> Defense Counsel: If I can just add one thing, Your Honor, don't mean to argue with the Court. But just to remind the Court,

> Your Honor, Mr. Wilson did ask for a bench trial this is my recollection of it, [the Prosecutor] objected to having a bench trial. That's why we ended up with a jury trial.
>
> Court: Okay, I'm sorry if I remember it incorrectly.
>
> Defense Counsel: All I'm trying to say, Your Honor, is because that information did not come out because of a problem . . .
>
> Court: Then if that's the case, you are absolutely right, you had no choice.
>
> Defense Counsel: I'm asking the Court to suspend 7 years because of that.
>
> Prosecutor: So in essence, [Defense Counsel] is asking that his client have more of a suspended sentence because the State refused to waive jury trial?
>
> Defense Counsel: No, I'm not saying that, Your Honor.
>
> Court: The sentence is what I just said.
>
> Defense Counsel: All I'm saying is that . . .
>
> Court: I certainly did not punish him for not waiving jury. If I misrecalled then I certainly stand corrected. I was merely pointing out and probably it was something that you and Mr. Wilson had already thought of. But the Court sentence will stand.

Id. at 327-28.

The law presumes that a judge is unbiased and unprejudiced. Timberlake v. State, 753 N.E.2d 591, 610 (Ind. 2001). To rebut that presumption, a defendant must establish from the judge's conduct actual bias or prejudice that places the defendant in jeopardy. Smith v. State, 770 N.E.2d 818, 823 (Ind. 2002). Such bias and prejudice exists only where there is an undisputed claim or where the judge expressed an opinion of the

controversy over which the judge was presiding. Id. Here, Wilson has not rebutted the presumption of impartiality. Taken in context, the trial judge's comments do not indicate any bias or prejudice against Wilson.

Affirmed.

RILEY, J., and BARNES, J., concur.